Appendix A

BRIEF FOR RESPONDENTS

In the United States Court of Appeals
for the District of Columbia Circuit

No. 19,840

Volkswagenwerk Aktiengesellschaft,
Petitioner,

v.

Federal Maritime Commission and
United States of America,
Respondents,

Pacific Maritime Association and
Marine Terminals Corporation,
Intervenors.

ON PETITION TO REVIEW AN ORDER OF THE
FEDERAL MARITIME COMMISSION

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[i] QUESTIONS PRESENTED

In the opinion of respondents, the questions presented are as follows:

1. Did the Commission err in determining that no agreement subject to section 15 existed between Marine Terminals Corporation (MTC) and other members of Pacific Maritime Association (PMA) with respect to the assessments referred to on pages 2 and 3 of the Commission Report?

2. Did the Commission err in determining that MTC, in connection with the assessments referred to above, did not violate the prohibitions of section 16 First against making or giving undue or unreasonable preference or advantage to any particular person, locality or description of traffic in any respect whatsoever, or against subjecting any particular person, locality or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever?

3. Did the Commission err in determining that MTC, in connection with the assessments referred to above, did not violate the provisions of section 17 requiring the establishment, observance and enforcement of just and reasonable regulations and practices relating to or connected with the receiving, handling, storing or delivering of property?

4. Did the Commission in its Docket No. 1089 comply with the provisions of section 8 of the Administrative Procedure Act (5 U.S.C. 1007)? In particular, did the Commission make findings upon each of the material issues of law and fact presented and did it rule adequately on petitioner's exceptions to the decision of the Hearing Examiner?

[ii] 5. Do the conclusions of the Commission in the order dismissing petitioner's complaint support its order, and are the conclusions, in turn, supported by adequate findings, substantial evidence in the record and rational bases in the law?

[Subject Index and Tables of Authorities Omitted]

[1] COUNTERSTATEMENT OF THE CASE

Petitioner seeks review under the Review Act of 1950, 5 U.S.C. 1031, *et seq.*, of an order of the Federal Maritime Commission issued in the Commission's Docket No. 1089, *Volkswagenwerk Aktiengesellschaft v. Marine Terminals Corporation, et al.*, dismissing petitioner's complaint. The Commission's order was entered October 13, 1965, and the petition to review was filed on December 10, 1965.

Petitioner is a German corporation which manufactures Volkswagen automobiles. Petitioner ships its automobiles to ports on the United States Pacific Coast by means of common carrier and chartered (contract) vessels. During the year 1962, approximately 70 percent of petitioner's shipment of automobiles to the Pacific Coast were shipped on chartered vessels, and the remaining 30 percent were shipped via common carriers (I.D. 3).

Marine Terminals Corporation and Marine Terminals Corporation (of Los Angeles) (hereinafter referred to simply as MTC) were respondents in the Commission proceeding. Marine Terminals Corporation is an intervenor before this Court. MTC operates ocean terminals and performs stevedoring services at San Francisco and Long Beach. The overwhelming portion of MTC's business is performed for common carriers; the remainder for contract carriers (I.D. 4). Both MTC and MTC of Los Angeles are members of carloaders' associations whose agreements have been filed with and approved by the Federal Maritime Commission, pursuant to section 15 of the Shipping Act, 1916.

[2] Pacific Maritime Association (hereinafter simply PMA), an intervenor in the Commission proceeding and before this Court, is a nonprofit corporation organized in 1949 for the purpose of negotiating and administering labor

contracts with labor unions, on behalf of its membership (I.D. 5). Common and contract carriers, marine terminal operators, and stevedore contractors are eligible for membership in PMA; shippers as such are not eligible for membership. Collective bargaining between PMA and the labor unions is subject to the National Labor Relations Act and to the jurisdiction of the National Labor Relations Board, pursuant to 29 U.S.C. 141, *et seq.* Insofar as this case is concerned, collective bargaining takes place between PMA on the one hand and the International Longshoremen's and Warehousemen's Union (hereinafter ILWU) on the other hand, and this bargaining between the two parties deals with the work of longshoremen and marine clerks.

The dues and assessments of PMA are determined by a Board of Directors, the members of which are selected from the membership of PMA as divided into eight groups, each group having an identity of interest. Among the assessments levied by the Board of Directors have been cargo dues which are computed by utilizing (1) "each ton of cargo loaded or discharged at U. S. Pacific Coast ports by or for members or for nonmembers; and (2) the man hours performed by employees of the members under the terms of ILWU agreements." (I.D. 5).

The history of the Commission proceeding goes back to 1957 when negotiations between PMA and the ILWU as to work-saving devices in connection with stevedoring at Pacific Coast ports first took place. At that [3] time PMA desired the opportunity to introduce work-saving devices where appropriate and to be free from strikes and slowdowns. The ILWU wanted assurances from PMA that workers would share in the monetary benefits realized from such work-saving devices, that there would be no acceleration of productivity demanded from individual workers, and

finally that there would be no unsafe conditions created as a result of the introduction of labor-saving devices.

In August of 1959 PMA agreed to accumulate a fund of approximately $1,500,000 for the benefit of its employees, and at the same time the ILWU agreed to a further study of mechanization which would be completed not later than June of 1960. On October 18, 1960, the parties signed a "Memorandum of Agreement on Mechanization and Modernization." This agreement set up a "mechanization and modernization fund" (hereinafter simply "the fund") of $29,000,000, which sum was to be raised over a period of time to extend to July 1, 1966, on which date the agreement would expire. By the terms of the agreement, the members of PMA were to accumulate the $29,000,000 at the rate of $5,000,000 each year with $2,500,000 being collected for the period January 1, to June 30, 1966. Added to that accumulation would be the $1,500,000 already collected by PMA as a result of the August 1959 agreement.

As PMA's membership was responsible for the accumulation of the fund, the ILWU agreed to allow PMA solely to determine how the fund would be accumulated. In January of 1961, the Board of Directors and [4] the membership of PMA approved the adoption of a majority report of a "Work Improvement Fund Committee" which had been appointed by the President of PMA in November of 1960, and at the same time the membership ratified the Memorandum of Agreement entered into between PMA and the ILWU. Except as the facts of this case necessarily include mention of the Memorandum of Agreement, it is not directly involved in this proceeding. No party has attacked the agreement or the purposes thereof. On the contrary, petitioner admits that it supports the purposes of the agreement (Pet. Br. 4).

What is at issue in this proceeding is the method approved by PMA for raising the fund. As stated above, the method was adopted by PMA's membership in January of 1961. The resolution of the meeting reads in part as follows:

> It was regularly moved and seconded that the Majority recommendation of the Committee appointed to propose a method for collection of the Fund, calling for a tonnage formula with bulk cargoes at one-fifth the general cargo rate, be adopted, with the understanding that the method of collection will receive continued study and be presented to the Membership again in six months.

The Chairman explained the three recommendations which had been made:

1. *Majority Report* (on which the motion is based)
   26¾¢ on general cargo
   5½¢ on bulk
2. *Minority Report*
   10¢ a ton
   12¢ per manhour
3. *Board of Directors*
   20¢ a ton

[5] It was further agreed that the Board of Directors would examine and determine the definition of bulk cargoes.

At this time a secret ballot was taken and the vote was polled as follows:

246 yes; 74 no; 21 withheld; 67 absent

Motion carried by a majority of the total voting strength of the Association membership. (Exh. 20, pp. 3-4).

In essence, the majority report which was adopted by the membership of PMA provided that members would be

assessed on the basis of tonnage carried or handled, with bulk cargo being assessed at one-fifth the rate for general cargo. Shortly after the meeting of PMA's membership, the Board of Directors altered the assessment for general cargo to 27½¢ per ton carried or handled. The assessments were to work as follows: Each member of PMA would remit to PMA as trustee for the fund established pursuant to the agreement between PMA and the ILWU an amount equal to 27½¢ per ton of cargo carried or handled, a ton constituting for the purposes of the assessment 2000 pounds weight, or 40 cubic feet measurement. One thousand board feet of lumber also constituted a ton. These measurements are the ordinary measurements used in manifesting cargo for carriage by sea. The special category of bulk cargo was to be assessed at 5½¢ per ton carried or handled.

PMA further provided that the declarations of tonnage by its members were to be based on and made in "the same manner as" declarations made to PMA for the purposes of assessing dues for the year 1959 (Exh. 2n, p. 3). The declaration form used for dues purposes was to be continued for the purposes of reporting tonnages for fund assessments. [6] At this point the real gravamen of petitioner's complaint becomes apparent. MTC, for dues purposes, had reported the handling of Volkswagen automobiles on a measurement ton basis, in conformity with generally accepted practice. That is, MTC's dues to PMA were assessed on the basis of measurement tons of cargo carried—40 cubic feet of cargo constituting a measurement ton. A Volkswagen automobile on this basis measures 8.7 measurement tons, whereas if weight ton were utilized, it would measure only 0.9 tons (I.D. 13). An assessment for the fund based on measurement tons at 27½¢ per ton equalled $2.35; the same assessment based on weight tons equalled $.25 (I.D. 13).

The assessment formula on automobiles was prescribed by PMA by a letter to its membership dated January 16, 1958, for use in determining tonnage dues. Subsequent to the establishment of the method for determining assessments for the fund, PMA sent out a circular letter to its members stating that it had become apparent that some members were not adhering to the measurement ton formula in reporting automobiles carried or handled:

> Since the institution of the Modernization and Improvement Fund, it has come to our attention a number of contracting stevedores and steamship companies are still reporting automobiles for tonnage dues purposes on a weight basis instead of measurement. The theory of dues and assessments is predicated on the fact member companies shall pay on exactly the same basis thereby assuring all companies each is paying its fair share of a dues or assessment program.
>
> [7] Any steamship company or contracting stevedore who has not been reporting and paying dues on automobiles on a measurement basis since January 1958 should immediately complete a revised tonnage declaration form indicating by vessel and date the tonnage on automobiles reported on a weight basis, the tonnage which should have been reported on a measurement basis, and the difference which is assessable at 2½ cents per ton. This statement should be completed as promptly as possible and sent to the Association with a check to cover this amount of additional dues involved. *Future reports on automobiles for PMA dues and Modernization and Improvement Fund purposes are to be made on a measurement basis.* Exh. 36, *emphasis supplied.*

Thus, PMA unequivocally required its members to report automobiles based on measurement tons as opposed to any other method of computation. That the assessment on a Volkswagen automobile based on measurement tons results

in a figure approximately ten times that which would result if weight tons were used cannot be denied, and respondents do not contest petitioner's statement to that effect. In fact, the Commission's Hearing Examiner so found (I.D. 13).

As stated above, petitioner ships a greater percentage of its automobiles which are destined for the Pacific Coast via chartered (contract) vessels rather than by common carriers. In 1962, only about 30 percent were shipped via common carriers. The discharge rate, or charges for handling one of petitioner's automobiles from the ship to the dock, was negotiated between petitioner and MTC, and the resulting figure was called the "unit price." (I.D. 9). As the Examiner found, this price was a combination of actual costs, overhead, and profit, as well as the tonnage dues which MTC was required to remit to PMA. Petitioner knew [8] that the tonnage dues were assessed on its automobiles on the basis of measurement tons, and no protest was made by petitioner as to this method of assessment (I.D. 10). As regards petitioner's automobiles which were carried via common carrier, the stevedoring charges were based on measurement tons and tonnage dues were paid to PMA accordingly.

Thus, a more complete picture of petitioner's cause of complaint and the facts and circumstances surrounding the assessments for the fund emerges. PMA's members had been paying dues to PMA, which dues were assessed on automobiles carried or handled based on the measurement tons of each automobile: MTC paid dues on this basis, or at least there is nothing in the record to indicate that it deviated from that formula, from 1958 until 1961. PMA established the method of assessments for the fund on the same basis as tonnage dues were assessed, at which time petitioner felt aggrieved. Thence ensued the following events during which petitioner attempted to seek relief

from the formula employed by PMA in collecting and making assessments for the fund.

MTC soon realized that it would be unable to absorb the fund assessments on automobiles as a cost of doing business, and it necessarily decided that the assessments would have to be passed on to the shippers, petitioner included. Petitioner protested the method of making fund assessments, although it continued to use MTC's facilities. Petitioner wrote to PMA on January 17, 1961, stating in part:

> [9] In conclusion, we are compelled to request immediate action by the Pacific Maritime Association to remove the threat of tonnage assessment on a measurement basis against the importation of unboxed foreign automobiles. Failing timely and affirmative action by your Association, we shall have no recourse but to seek legal order to remove this overwhelming discrimination which is implicit in an attempted levy at a level 10 to 15 times greater than assessed on other general cargo. Furthermore, you may expect legal action against the Pacific Maritime Association for recovery of damages suffered by Volkswagenwerk, A.G. and the distributors of these autos on the Pacific Coast, resulting from such restraint of trade. (Exh. 7, p. 3).

On March 1, 1961, MTC informed PMA that petitioner was refusing to pay the assessment based as it was on measurement tons. MTC informed PMA that petitioner had informed its agents "that if our rates are renegotiated and the assessment is placed in the rate, they will continue to deduct the 27½¢ per measurement ton." (Exh. 9). At the time petitioner refused to pay the fund assessment, MTC likewise ceased remitting the assessments on petitioner's automobiles to PMA. See Exh. 13 and 14. At that time, however, PMA agreed not to press MTC for payment of the assessments, pending a discussion of various means of legal redress.

Evidence in the record shows that petitioner was the only shipper of automobiles who protested the assessments for the fund (I.D. 19). One common carrier of Volkswagen automobiles, Wallenius Lines, at first paid the assessment but then upon learning that petitioner was refusing to pay the assessments, it likewise refused to pay them. On January 25, 1963, the agents for Wallenius Line informed the California Stevedore & [10] Ballast Co. that it would not pay the assessments on unboxed automobiles, but it guaranteed "that these charges will be paid to you as soon as a determination has been made that these charges are legal." (Exh. 33, p. 2). Companies which were not members of PMA paid assessments at the same rate as members, under the terms of the supplemental agreement (Exh. 1c, p. 8).

The Commission's Hearing Examiner found that, starting about 1961, stevedoring contractors "were able to increase the rate of production of their gang hour. This was attributable to improvements on the Volkswagen vessels that facilitated unloading of the automobiles." (I.D. 20). The Examiner further found that officials of the contractors determined that benefits, such as freedom from strikes or slowdowns, had been derived from the funding plan.

Petitioner's objections to the assessment formula were reiterated on several occasions. See, *e.g.* Exh. 26. On December 12, 1961, the funding committee of PMA met and decided to reject petitioner's proposal that "unboxed autos be assessed on the basis upon which they are normally handled between factory, loading terminal, ship's hold, discharge terminal, distributor, dealer, retail buyer—namely, per unit." (Exh. 26, p. 2). On December 13, 1961, the Board of Directors of PMA met, and the following excerpt is taken from the minutes of that meeting:

> The Chairman read a communication from the Funding Committee covering the problem of collecting funds

from Volkswagen due to the Mechanization Fund. After discussion it was decided that the method of contribution [11] originally established for this type of cargo should be maintained. Marine Terminals requested that a letter covering this discussion be forwarded to them and that they be authorized to bring suit against Volkswagen for the monies due. Marine Terminals also requested that PMA give both legal and moral support on the Volkswagen suit. It was agreed that PMA will give such support and will participate in any legal action taken and that the matter will be turned over to PMA Legal Counsel. Exh. 2h, p. 4.

At various times thereafter the question of instituting legal proceedings to force payment of the assessments was considered. Exh. 29. On March 27, 1962, the Coast Steering Committee of PMA directed that a letter be sent to MTC advising that the "Funding Committee had again reconsidered the Mechanization Fund assessment on unboxed automobiles and did not recommend any change in the present assessment." (Exh. 2f, pp. 5-6). On July 3, 1962, the Board of Directors of PMA approved the recommendation of the Coast Steering Committee that PMA counsel be authorized to institute action against members if the members were in default on their assessments. (Exh. 2f, p. 6). Previously, PMA had advised MTC that legal action should be taken to obtain payment of the assessments from petitioner (Exh. 31). Ultimately, however, it was PMA who on August 14, 1962, instituted suit against MTC in the United States District Court for the Northern District of California to recover the assessments due. MTC, on September 13, 1962, impleaded petitioner, and the District Court on November 29, 1962, stayed proceedings on petitioner's request to enable petitioner to institute proceedings before the Federal Maritime Commission. The follow-

ing issues were to be submitted to the Commission for its determination:

> **[12]** 1. Whether the assessments claimed from [Volkswagen] are being claimed pursuant to an agreement or understanding which is required to be filed with and approved by the Federal Maritime Commission under Section 15 of the Shipping Act, 1916, as amended, 46 U.S.C. 814 (1961), before it is lawful to take any action thereunder, which agreement has not been so filed and approved.
>
> 2. Whether the assessments claimed from [Volkswagen] result in subjecting the automobile cargoes of [Volkswagen] to undue or unreasonable prejudice or disadvantage in violation of Section 16 of the Shipping Act, 1916, as amended, 46 U.S.C. 815 (1961).
>
> 3. Whether the assessments claimed from [Volkswagen] constitute an unjust and unreasonable practice in violation of Section 17 of the Shipping Act, 1916, as amended, 46 U.S.C. 816 (1961). (R. 5-6).

On January 29, 1963, petitioner filed its complaint with the Commission. Hearings were held before Examiner Benjamin A. Theeman, a Federal Maritime Commission Hearing Examiner, and on June 5, 1964, the Examiner issued his Initial Decision. The Examiner found, *inter alia*, that MTC were persons subject to the Shipping Act, and that the agreement entered into between MTC and other PMA members was a cooperative working arrangement. The Examiner found that the agreement consisted of two items: (1) the report of the Work Improvement Fund Committee dated January 4, 1961 (Exh. 5a) and (2) the resolution of PMA's membership dated January 10, 1961 (Exh. 2o). The Examiner further found:

> A careful reading of these documents show that they deal solely with "the appropriate method of dividing the costs" of the Mech Fund among the PMA members. Nothing contained in the Committee report or the

minutes of the January 10, 1961 meeting indicates that the Committee or the PMA membership in ratifying the majority report had gone or had intended to go beyond that specified area. ID. 22-23.

[13] The Examiner went on to find, however, that the cooperative working arrangements between MTC and the other members of PMA was not such an arrangement required by section 15 of the Shipping Act, 1916, to be filed with and approved by the Federal Maritime Commission. Thus, the arrangement was not one which fixed or regulated transportation rates or fares; gave or received special rates, accommodations, or other special privileges or advantages; controlled, regulated, prevented, or destroyed competition; pooled or apportioned earnings, losses, or traffic; allotted ports or restricted or otherwise regulated the number and character of sailings between ports; or limited or regulated in any way the volume or character of freight or passenger traffic to be carried. The arrangement, however, did, the Examiner thought, come literally within the seventh category of agreements required by section 15 to be filed; that is, the arrangement did provide for an exclusive, preferential or cooperative working arrangement. The Examiner concluded that the arrangement did not pertain to ocean transportation, and that it was, therefore, not within the purview of the Shipping Act.

Additionally, the Examiner found it unnecessary to determine whether the cooperative working arrangement was part of a collective bargaining agreement or whether the arrangement violated the antitrust laws. I.D. 33-34. The Examiner also found no violations of sections 16 and 17 of the Shipping Act.

After exceptions and oral argument, the Commission issued a report on October 13, 1965. The majority of the

Commission affirmed the [14] Examiner's finding that the arrangement between MTC and other members of PMA was not subject to the Shipping Act, 1916, even assuming "all of the members of PMA are 'other persons' within the meaning of the Shipping Act, 1916, . . ." (R. 7). The Commission found that the agreement among the membership of PMA establishing the method of assessing for the collection of the fund "does not fall within the confines of section 15 as standing by itself, it has no legal impact upon outsiders." The Commission further found that an additional agreement among the membership of PMA to pass on all or part of the assessments for the fund to carriers or shippers had not been established. R. 8-9.

In finding no additional agreement, the Commission stated:

> The record is devoid of evidence showing the existence of such an additional agreement. The record at most shows that some stevedores expressed the opinion that it might be necessary to pass on the assessment in the stevedoring rate to their customers. That these opinions were the basis for an agreement as to the manner of assessing their customers is denied by statements of witnesses for both PMA and respondents. Such conclusion is further vitiated by the actions of respondent and perhaps other terminal operators, who were willing to absorb a part of the assessment. R. 9.

The majority of the Commission found itself in agreement with the Examiner that there were no violations of sections 16 and 17 of the Shipping Act. Commissioner Patterson dissented from the majority report in all respects; Commissioner Hearn agreed with the majority that there were no violations of sections 16 and 17 of the Shipping Act, but he disagreed with the majority on the issue of whether there was an agreement subject [15] to section 15. He would

have required PMA to file its cooperative working arrangement with the Commission and seek approval.

Petitioner thereupon filed its petition to review within the sixty-day period prescribed by the Review Act of 1950, and PMA and MTC were granted leave to intervene.

SUMMARY OF ARGUMENT

The agreement among the members of the Pacific Maritime Association (PMA) establishing the mechanization and modernization fund and providing for assessments for the fund from members on the same basis as members were assessed for PMA dues was a cooperative working arrangement, but the agreement was not one required by section 15 of the Shipping Act, 1916, to be filed with and approved by the Commission. As the agreement did not affect the competitive relationships of the PMA members and did not pertain to ocean transportation, the legislative history of section 15 of the Shipping Act and a construction of like provisions of the Interstate Commerce Act leads to the conclusion that the agreement is not within the purview of the Shipping Act.

The Commission correctly found that Marine Terminals Corporation (MTC) did not violate section 16 of the Shipping Act, 1916, by discriminating against petitioner's automobiles. In view of past Commission precedent that a competitive relationship between shippers must be shown to sustain an allegation of a violation of section 16 and petitioner could **[16]** not make such a showing as there was no other cargo classification in competition with automobiles, petitioner's allegation could not stand.

Finally, the Commission correctly found that MTC did not violate section 17 of the Shipping Act, 1916, by its use of the measurement ton rather than the weight ton for

making assessments on automobiles. Since MTC had taken all reasonable steps to have the assessment altered and had even offered to absorb some of the assessment, the Commission's finding that the inclusion of the assessment by MTC in its charges to petitioner was a reasonable business practice was, under the circumstances, proper.

ARGUMENT

I. The Commission Correctly Found That the Agreement for Raising the Mech Fund Was Not Subject to Section 15 of the Shipping Act, 1916.

The Commission found that the agreement among the members of PMA for raising the fund was not subject to section 15 of the Shipping Act, 1916, even though that agreement could be termed a "cooperative working arrangement" within the meaning of the statute. Even if section 15 could literally encompass any such arrangement, the Commission found,

> the legislative history is clear that the statute was intended by Congress to apply only to those agreements involving practices which affect that competition which in the absence of the agreement would exist between the parties when dealing with the shipping or travelling public or their representatives. *D. J. Roach Inc. v. Albany Port District et al.*, 5 F.M.B. 333, 335. (R. 7, footnote omitted).

[17] In other words, the Commission said, the arrangement among the members of PMA was not among "the type of agreements which affect competition by the parties in vying to serve outsiders . . . ." (*Ibid.*)

An examination of the legislative history bears out the Commission's finding. The Alexander Committee Report of 1914 treated only those

> written agreements, conference arrangements or gentlemen's understandings, which have for their principal purpose the regulation of competition through either (1) the fixing or regulating of rates, (2) the apportionment of traffic by alloting the ports of sailing, restricting the number of sailings, or limiting the volume of freight which certain lines may carry, (3) the pooling of earnings from all or a portion of the traffic, or (4) meeting the competition of nonconference lines. *Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade,* H.R. Doc. 805, 63rd Cong., 2d Sess., 415 (1914).

It is clear that the agreement among the members of PMA does not come within the Alexander Committee's definition of those agreements which were to be regulated or prohibited.

The Examiner found that some limitation must be imposed on the requirements for filing agreements with the Commission:

> It would be idle conjecture to imagine what might be filed with the Commission, if the requirement in section 15 that every agreement between common carriers and other persons subject to the act providing for a cooperative working arrangement were taken literally. (I.D. 29).

This is certainly not to say that the Commission has been loath to find agreements subject to the statute where the facts of a given case put them squarely within the intent of section 15. But, the Commission has [18] realized that limitations are inherent in a sensible reading of the statute.

In 1927, the U. S. Shipping Board, one of the Commission's predecessor agencies, limited the language of section 15 as follows:

> As contended by conference representatives in this proceeding, a too literal interpretation of the word

"every" to include routine actions between the carriers under conference agreements would result in delays and inconvenience to both carriers and shippers. *Ex Parte 4, Section 15 Inquiry,* 1 U.S.S.B. 121, at 125 (1927).

The Commission and its predecessors have elaborated on what constitutes a section 15 agreement. In *Mitsui Steamship Co. v. Anglo Canadian Shipping Co.,* 5 F.M.B. 74 (1956), the Federal Maritime Board found that a "new conference interpretation" was subject to the filing and approval requirements of section 15. In *Associated-Banning Co., et al. v. Matson Nav. Co., et al.,* 5 F.M.B. 336 (1957), the Board held that an agreement evidencing a general intent to enter into certain arrangements was not a complete agreement under the Act.

In 1963, the Commission in *Pacific Coast Port Equalization Rule,* 7 F.M.C. 623, *aff'd sub nom. American Export & Isbrandtsen L. v. Federal Maritime Com'n,* 334 F.2d 185 (9th Cir. 1964), found that a rule providing for port equalization was a new arrangement, not sanctioned by an approved agreement, which was required to be filed with and approved by the Commission. And, finally, in its Docket No. 872, *Joint Agreement Between Member Lines of the Far East Conference and the Member Lines of the Pacific Westbound Conference,* July 28, 1965, the Commission found [19] that rate-making procedures not fairly embraced within an approved agreement required separate approval pursuant to section 15. Thus, the Commission has not been slow to make findings that certain types of agreements are subject to section 15 and are required to be filed with the Commission.

The courts have construed the provisions of the Shipping Act, 1916, in the light of the provisions of the Interstate

Commerce Act, upon which the Shipping Act was closely modeled. See *U.S. Nav. Co. v. Cunard S.S. Co.*, 284 U.S. 474 (1932). Section 15 of the Shipping Act parallels Section 5(1) of the Interstate Commerce Act, and the traditional interpretation of Section 5(1) of the Interstate Commerce Act is that it does not encompass agreements affecting labor-management relationships except where the competitive relationships of the parties are affected. In *Kennedy v. Long Island Rail Road Company*, 319 F.2d 366 (1963), the Second Circuit held that a strike insurance plan did not violate proscriptions of the Interstate Commerce Act:

> These assertions must also fail, for the fundamental reason that the named statutes [the Sherman Act and the Interstate Commerce Act] were designed principally to outlaw restraints upon commercial competition in the marketing and pricing of goods and services and were not intended as instruments for the regulation of labor-management relations. 319 F.2d 366, at 372-3.

In commenting on the pooling characteristics of the strike insurance plan in the *Kennedy* case, the Second Circuit went on to state:

> **[20]** It may be true that the collection of premiums and payment of proceeds to a struck railroad might be viewed literally as the "division * * * of gross or net earnings," since contributions to the insurance fund were from the passenger and freight revenues of the participating roads. But so too are their contributions to the A.A.R., a trade association . . . whose expenses are met by assessments from its members in proportion to their operating revenues; but we do not understand the appellants to contend that the mere existence of the A.A.R., or of any other trade association in the transportation field, runs afoul of the anti-pooling pro-

> vision of the Interstate Commerce Act and also, incidentally, of the Sherman Act. Similarly here, the strike insurance plan does not represent an attempt to apportion business among competing railroads on a basis other than individual performance. Its validity under the Interstate Commerce Act § 5(1) can thus hardly be doubted. 319 F.2d 366, at 374 (footnotes omitted).

In the instant case, the Commission found that the mech fund agreement did not affect the competitive relationships among the PMA members, as there was no agreement among the members to pass on all or a part of the fund assessments. The decision of whether to absorb or pass on the assessments was left to each individual member, and no concerted action was taken to determine the course the members would take. The Commission explicitly found that there was a divergence of opinion among the members as to whether the assessments would be absorbed or passed on (R. 9).

The Commission's interpretation in these circumstances was a reasonable one, and even though it may not have been the only reasonable one that could have been reached, it should be upheld especially where, as here, it is supported by the legislative history and a similar construction of like provisions of the Interstate Commerce Act. As this Court [21] recently said in *Philadelphia Television Broadcasting Co. v. Federal Communications Commission,* decided March 28, 1966 (No. 19,577):

> In approaching the problem of statutory interpretation before us, we show "great deference to the interpretation given the statute by the officers or agency charged with its administration. 'To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable

one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' " Slip Opinion, pp. 2-3 (footnote omitted).

II. The Commission Correctly Found No Violation of Section 16 of the Shipping Act, 1916.

Petitioner alleges that its automobiles are discriminated against and "logs, lumber, bulk cargo, scrap metal, in fact, all other general cargo, are preferred" (Pets. Br. 40), in violation of section 16 of the Shipping Act, 1916. That section makes it unlawful for any common carrier or other person subject to the Act

> . . . To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. . . .

Petitioner admitted in its Brief to the Examiner that previous decisions of the Commission held section 16 inapplicable in a case such as the instant one. See, *e.g., Huber Mfg. Co. v. N. V. Stoomvaart Maatschappij "Nederland,"* 4 F.M.B. 343 (1953); *The Paraffine Co.'s, Inc. v. Amer.-Hawaiian S.S. Co., et al.,* 1 U.S.M.C. 628 (1936); *Johnson Pickett Rope* [22] *Co. v. Dollar S.S. Lines et al.,* 1 U.S.S.B.B. 585 (1936). In those cases the Commission's predecessors held that section 16 was applicable only in situations concerning similarly situated shippers or ports. The Examiner found that there was "no other cargo classification in competition with automobiles" and he, therefore, rejected petitioner's allegation of a violation of section 16 (I.D. 35). The Commission affirmed (R. 9).

Petitioner now reiterates its argument based wholly on the Government's Brief in the case of *New York Foreign Freight Forwarders and Brokers Assn. v. Federal Maritime Commission*, 337 F.2d 289 (2nd Cir. 1964), *cert. den.* 380 U.S. 914 (1965). In that case the Commission was defending a rule which required full disclosure to shippers of insurance costs of the freight forwarders, a rule which was the culmination of many years of Congressional and agency hearings. The Court of Appeals affirmed the rule. In promulgating the rule the Commission found it unnecessary to make a finding of a competitive relationship as a basis for holding the disadvantage in that case unreasonable, because of the peculiar nature of the industry (freight forwarding) that it was regulating. Arguments that such a finding was necessary were urged on the Second Circuit, which rejected them:

> Transportation or wharfage charges are dependent upon the particular commodity involved; the cost for shipping or storing bananas, for example, bears no relation to the fees levied for heavy industrial equipment. To find an unlawful discrimination in transportation charges thus quite properly requires a showing of competitive relationship between two shippers who are charged different **[23]** prices. But forwarders render substantially the same service to all shippers in procuring insurance or arranging cartage; the commodity being shipped has little or nothing to do with the reasonableness of the fee exacted for the forwarder's service. The very practice of charging shippers disguised mark-ups of widely varying amounts on substantially identical services, without justification, seems to us to be prima facie discriminatory in a regulated industry. In any event, we do not believe competitive relationships must be shown to justify the prophylactic disclosure technique of Rule 510.23(j). 337 F.2d at 299-300.

In the instant case, the assessments bear a direct relationship to the type of cargo carried or handled, and thus a competitive relationship must be shown. Both the Examiner and the Commission, we submit, correctly found no violation of section 16.

III. The Commission Correctly Found No Violation of Section 17 of the Shipping Act, 1916.

Petitioner alleges that the use of the measurement ton rather than the weight ton for making assessments for the fund constitutes an "unreasonable practice * * * relating to * * * the handling of property" in violation of section 17 of the Shipping Act, 1916. If the assessment were made on a weight ton basis, petitioner's grievance would probably be eliminated (R. 10). Both the Examiner and the Commission found no violation of section 17 in the manner of making assessments for the fund. The Examiner found no evidence that "charges attributable to the handling of other cargo are attempted to be collected by Respondents from Volkswagen" (I.D. 37) and that it appeared that the inclusion of the assessment by MTC in their charges to petitioner was only a matter of "business expediency." (*Id.*). The Examiner therefore concluded that there was "insufficient evidence * * * to establish that this practice was either unjust or unreasonable." (*Id.*).

[24] Petitioner's admission that there is no requirement that all users of a facility be equally assessed, the Commission thought, was fatal to its section 17 allegation (R. 10). The Commission concluded that as long as "substantial benefits" accrue to one against whom a charge is levied, the charge would not be declared unlawful. See *Evans Cooperage Co., Inc. v. Board of Commissioners,* 6 F.M.B. 415 (1961).

In the context of the allegation of a section 17 violation, it must be kept in mind that petitioner is charging MTC

and not PMA with the violation. And, it is PMA's membership that made the decision as to how the assessments for the fund were to be made, and more particularly, that assessments on automobiles were to be made on the basis of "measurement ton." Therefore, MTC is paying assessments to PMA as PMA's membership has directed. The fact that it is passing them on to petitioner is a decision that it has reached by itself. The Commission recognized that MTC's activities were reasonable because "they have sought to change the method of 'Mech' fund assessment on automobiles, have offered to pass on only a part of the assessment, and have levied a part of their dues assessment against Volkswagen for several years upon the same measurement basis without protest." (R. 10-11).

The Examiner recognized the necessity for focusing only on the relationship between petitioner and MTC:

> As stated above, neither PMA nor the agreement between and among PMA members has been found subject to the Act. For that reason we do not comment on the justness or unjustness, reasonability or unreasonability of the actions of PMA [25] or the aims and purposes of that agreement. Volkswagen is complaining about Respondents practice of including the Mech fund assessment in its stevedoring rate. *This discussion concerning Section 17, therefore, deals with the relationship between Respondents /MTC/ and Volkswagen.* (I.D. 35, *emphasis supplied*).

The Examiner went on to find that there was no evidence that the inclusion of the assessments increased MTC's profits or that MTC's profits were unreasonable. He concluded that the inclusion of the assessment represented an operating expense, and that MTC had taken all reasonable steps available to assist petitioner in order to have the assessment changed by PMA. Those efforts having failed,

MTC was not guilty of a violation of section 17 by continuing to include the assessment in its charge to petitioner.

Respondents submit that this is an area where the expertise of the agency is entitled to its greatest weight. Both the Commission and the Examiner examined all the pertinent facts and found that MTC's conduct did not violate section 17. That finding should be affirmed.

CONCLUSION

The Report and Order of the Federal Maritime Commission here under review should be affirmed.

Respectfully submitted.

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Appendix B

Sales of Volkswagen Automobiles in the United States, 1949-1966 (excluding trucks)

Year	Units	% Import Market
1949	2	
1950	157	0.9
1951	390	1.9
1952	601	2.0
1953	980	3.4
1954	6,343	19.5
1955	28,907	49.4
1956	50,011	50.9
1957	64,242	31.1
1958	78,588	20.8
1959	120,442	19.6
1960	159,995	32.1
1961	177,308	46.8
1962	192,570	56.8
1963	240,143	62.3
1964	307,173	63.4
1965	383,978	67.4
1966	420,018	63.8

Source: Ward's 1967 Automotive Yearbook, 29th Ed., p. 170, Ward's 1965 Automotive Yearbook, 27th Ed., p. 178.

New Car Registrations in the United States, 1960-1966

Year	Total All Makes	VW
1960	6,576,650	159,995
1961	5,854,747	177,308
1962	6,938,863	192,570
1963	7,556,717	240,143
1964	8,065,150	307,173
1965	9,313,912	383,978
1966 (1st half)	4,212,720	203,121

Source: Automotive News, 1962 Almanac, pp. 37, 41; 1964 Almanac, pp. 14, 34; 1965 Almanac, p. 94; 1966 Almanac, p. 8; Automotive News, August 14, 1967, p. 1.